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No. 09-953

In The

Supreme Court of the United States

TIM REISCH, *et al.*,

Cross-Petitioners,

v.

CHARLES E. SISNEY; JAMES DEAN VAN WYHE; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Cross-Petitioners' Reply Brief in Support of Conditional Cross-Petition for a Writ of Certiorari

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QUESTION PRESENTED

1. Whether federal spending for state prisons violates the "general Welfare" limitation of the Spending Clause, and this Court's precedent in *United States v. Butler* and *South Dakota v. Dole*, because it constitutes spending for local, rather than national purposes, and because it intrudes upon the states' police power, which is a core function of government, traditionally reserved to the states?

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REASONS FOR GRANTING THE WRIT

I. The Lack of a Circuit Split Is Not Grounds For Denying Certiorari When The Circuit Courts Have Decided An Important Issue Of Federal Law Either Contrary To Prior Decisions Of This Court Or As Yet Undecided By This Court.

Neither Respondent identifies any problems with this case serving as a vehicle for addressing the significant constitutional question presented by the cross-petition for writ of certiorari.[1] Rather, Respondents the United States and Charles Sisney both

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[1] Sisney does contend that because the petition includes historical references not cited below, certiorari is not warranted. Sisney BIO, at 28. This Court considers whether the *issue* was raised below, not whether all of the arguments in support of the issue were marshaled. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). There is no question that the issue whether RLUIPA was a valid exercise of Congress' spending power was properly raised and also decided below. Pet. App. 14a. Sisney further contends that the cross-petition argues that the Spending Power is limited to advancing the other powers delegated to Congress in Article I, Section 8 of the Constitution, which he contends was not only not raised below but is foreclosed by this Court's decision in *United States v. Butler*, 297 U.S. 1 (1936). *Id.* at 28, 34 n.5. Sisney misunderstands the argument in the cross-petition, which is ultimately based not on the Madisonian view of the Spending Power rejected in *Butler*, but on the Hamiltonian view adopted in *Butler*. Cross-Pet. at 19-20. Hamilton recognized that spending must be "general, and not local." *Butler*, 297 U.S., at 67. That point was pressed by cross-petitioners below, but rejected. Pet. App. 16a. It is required by *South Dakota v. Dole*, 483 U.S. 203 (1987), and, more explicitly, by *Helvering v. Davis*, 301 U.S. 619 (1937). There is no vehicle problem here.

contend in their respective briefs in opposition that the decision of the Eighth Circuit was correct and that, "[a]bsent a split among the circuits, ... review by this Court is not warranted." Brief in Opposition of Respondent Sisney ("Sisney BIO") at 22; *see also* Brief of the United States in Opposition ("U.S. BIO") at 4 (contending that lack of a circuit split is alone a sufficient reason to deny the petition). There is of course another ground for considering certiorari, recognized by Respondent Sisney but not addressed by Respondent United States, namely, that this Court will consider granting certiorari when a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Contrary to Respondent Sisney's assertion, both of those grounds pertain here.

The United States notes that six Circuit Courts of Appeal have upheld Section 3 of RLUIPA as a valid exercise of Congress' Spending Power, but none of those courts have given the matter serious treatment. Indeed, in two of the cases, the argument that the federal spending at issue exceeded Congress' power to spend for the "general welfare"—the first necessary element articulated by this Court in *Dole* and the only element challenged by this cross-petition—was not raised by the parties and therefore not addressed by the courts in any but the most conclusory manner. *See Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) ("The prison officials do not explicitly contend that RLUIPA violates the first *Dole* limitation"); *Benning v. Georgia*, 391 F.3d 1299,

1305 (11th Cir. 2004) (the state "does not dispute that RLUIPA serves the general welfare").

The analysis by the circuit courts in cases where the issue was raised by the state is no more substantial. In *Madison v. Virginia*, the Fourth Circuit's analysis of Virginia's Spending Clause challenge consists of a single sentence:

> Here, Congress sought to protect prisoners' religious liberty from unjustified and substantial burdens, *see Cutter*, and we have no trouble concluding that RLUIPA's "attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare." *Charles*.

474 F.3d 118, 125 (4th Cir. 2006). The Seventh Circuit's analysis in *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), is but a single paragraph, most of which is devoted to summarizing the Ninth Circuit's two-paragraph decision in *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002). The opinion closes with the same *ipse dixit* relied upon by the Fourth Circuit:

> Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority.

348 F.3d, at 607. *See also Mayweathers*, 314 F.3d, at 1066 ("protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare"). Although not cited by the United States, the Fifth Circuit has also concluded that Section 3 of RLUIPA "was passed pursuant to the Spending Clause," without any analysis whether it was valid under that clause. *Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *petition for certiorari filed*, 77 USLW 3657 (May 22, 2009) (NO. 08-1438).

Only in the first of these cases—the Ninth Circuit's decision in *Mayweathers*—was a petition for certiorari even filed. *Alameida v. Mayweathers*, 540 U.S. 815 (2003). The States did not seek certiorari in *Madison*, *Cutter*, *Charles*, or *Benning*, and the Spending Clause challenge is not at issue in the petition for certiorari pending before this Court in *Sossamon*. In short, the circuit courts are well on their way to having completely decided an important issue of federal constitutional law that either conflicts with the prior decisions of this Court in *Dole*, *Helvering*, and *Butler* or, at the very least, has not been decided by this Court but ought to be. That a seventh circuit court has now weighed in on the issue, "adopt[ing] the reasoning set forth in those cases [scant as it was] *with little to add*," Pet. App. 14a, strengthens rather than weakens the argument for granting the petition for a writ of certiorari in this case. There is very little percolation of the issue yet to be had.

II. The Circuit Courts Have Misconstrued *Dole* And The Cases Upon Which It Relies.

From what little analysis there has been regarding the Spending Clause challenge to RLUIPA, it is clear that the lower courts have uniformly made two fundamental errors in how they have applied the first prong of this Court's analysis in *Dole*. First, they have focused exclusively on the conditional regulations rather than on the underlying spending, and second, they have deferred to Congress not just on what constitutes "welfare," but on whether that welfare is "general" or "local." Those analytical errors, perhaps grounded in ambiguity in this Court's decision in *Dole*, warrant review and correction by this Court, less a critically importation limitation on the power of Congress be rendered null.

A. The federal spending program, not just the regulatory conditions, must further the "general welfare."

The first fundamental error committed by the circuit court below (and by the other courts it followed) is in looking exclusively at whether the *regulations* contained in RLUIPA further the general welfare, whereas the *Dole* analysis requires that the *spending* to which the regulations are attached also be in furtherance of the general welfare. As the Solicitor General herself recognizes, RLUIPA is not a spending statute, but one that ties new regulations to previously enacted spending statutes. U.S. BIO, at 6. By focusing exclusively on whether RLUIPA, rather than federal spending on state prisons, furthers the general welfare, the courts below have misapplied *Dole*, in which this Court looked first to "whether a

particular *expenditure* is intended to serve general public purposes . . . ." 483 U.S., at 207 (citing *Helvering*, 301 U.S., at 640, 645) (emphasis added).

As the citation to *Helvering* makes clear, the first focus must be on the spending itself rather than on the conditions attached to the spending. *See Helvering*, 301 U.S., at 640 ("Congress may *spend money* in aid of the 'general welfare'") (emphasis added); *id.*, at 645 (discussing "[w]hen money is spent to promote the general welfare"); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare"); *Butler*, 297 U.S., at 64 ("The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted").

Because there was no question in *Dole* that the "general" or national welfare was furthered by federal spending for the *interstate* highway system, which was the federal spending underpinning the national drinking age regulation at issue in the case, the *Dole* Court proceeded directly to consider whether the drinking age regulations themselves furthered the general welfare. *Dole*, 483 U.S., at 208. There is no suggestion in *Dole* that this Court was eliminating the need for the underlying spending to also be in furtherance of the "general welfare" as a necessary precondition for conditional regulation tied to that spending. That would have overruled *Helvering* and *Butler*, and as this Court has frequently cautioned, it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v.*

Illinois Council on Long Term Care, 529 U.S. 1, 17 (2000).

B. Deference to congressional determination of "welfare" does not negate the need to draw a line between "general" and local welfare.

The second error committed by the lower courts is in assuming that the nearly unconstrained deference the *Dole* Court gave to Congress to determine what qualifies as "welfare" also extends to whether that welfare is in the "general" or "national" as opposed to merely "local" or "particular" welfare. *Compare Dole*, 483 U.S., at 208 ("the concept of *welfare* or the opposite is shaped by Congress") (emphasis added) *with Cutter*, 423 F.3d, at 585 ("In *Dole*, the Supreme Court instructed the lower courts to "defer substantially to the judgment of Congress" in deciding what constitutes "the general welfare," going so far as to suggest that the "general welfare" restriction might not be "judicially enforceable . . . at all") (internal citations omitted).

The confusion of the lower courts is perhaps understandable because *Dole* itself used the terms "general welfare" and "welfare" somewhat interchangeably, and only gave a nod to the issue under consideration here by citation to *Helvering*. Nevertheless, the issue is critically important to the meaning of the Spending Clause and to the very idea of limited government reflected in our Constitution and so frequently given voice by this Court. What qualifies as "welfare" in the "general welfare" formulation may well be a judicially unenforceable line, *see Dole*, 483 U.S., at 207 n.2, but whether something is na-

tional or instead merely local in scope certainly is not. "The line must still be drawn between one welfare and another, between particular and general." *Helvering*, 301 U.S., at 640-41 (cited in *Dole*, 483 U.S., at 207).

Spending for the "particular" or local welfare is unconstitutional, while spending for the "general" or national welfare is permissible. Although the *Helvering* Court said it would defer to Congress on close questions—the "middle ground" or "penumbra" between the two—it did not abdicate its responsibility of enforcing the constitution's prohibition on spending for the "particular" welfare, where "the choice" by Congress "is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.*, at 640.

That responsibility was abdicated by the court below, however, when it afforded unconstrained deference to Congress to determine both components of the "general welfare" limitation on the spending power, failing to even consider, much less draw, a line between "general" and "local" welfare. Sisney himself contends that such line-drawing is something "that the Constitution does not contemplate," Sisney BIO, at 36, yet for that proposition he cites a law review article by Professor Erwin Chemerinsky, not this Court's governing precedent in *Helvering* to the contrary. The unconstrained deference to the exercise of congressional power advocated by Sisney would result in no limitation on the power whatsoever, a theory of the Constitution that has repeatedly been rejected by this Court. *See, e.g.*, *Dole*, 483 U.S., at 207 ("The spending power is of course not unlimited"); *Butler*, 297 U.S., at 66 ("the power to spend

[is] subject to limitations"); *cf. United States v. Lopez*, 514 U.S. 549, 556 (1995) (noting that even the "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits").[2]

Spending for local prisons may well be the quintessential program that is local and not national. State prisons do not move in interstate commerce nor do they affect other states, and their operation is one of the most core aspects of state sovereignty. If "[t]he line must still be drawn between one welfare and another, between particular and general," as *Helvering* says that it must, the lower courts in abandoning that line have "decided an important federal question in a way that conflicts with relevant decisions of this Court," or at the very least have "decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). Certiorari is certainly warranted to address whether the line that *Helvering* said "must be drawn" has properly been abandoned by the lower courts.

Respondent Sisney concedes that the lower courts have not attempted to draw the line between local and national. Sisney BIO, at 36. But far from counseling against review by this Court, that acknowledgement of the lower courts' failure to comply with

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[2] Sisney misunderstands our reliance on Commerce Clause precedents. Sisney BIO, at 31-32. The position we advanced is not that Congress cannot use conditional spending to regulate ends beyond the other enumerated powers, but rather that the Spending Clause itself, like the Commerce Clause, contains limits on federal power. Cross-Pet. at 5-8.

Helvering compels review so that this Court can at least reassert that the line "must be drawn," clarifying any ambiguity in *Dole* that has led to contrary interpretations of the Spending Clause. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (noting that certiorari was granted in part "to resolve any ambiguity" in this Court's own opinions). Because the federal spending at issue here is so quintessentially local and intrudes on such a core aspect of state sovereignty as the management of state prisons, *Preiser v. Rodrigeuz*, 411 U.S. 475, 491–92 (1973), more than that should not be required, but if it is, a remand for line-drawing in the first instance by the lower courts would be the appropriate outcome, not a denial of certiorari.[3]

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[3] Sisney urges the Court to await a case until interference with core state sovereignty has been developed via evidentiary facts. Sisney BIO, at 34 n.5. Intrusions on something as core a function of state sovereignty as the running of a state prison should not require an evidentiary record. *Res ipsa loquitur*.

CONCLUSION

For the reasons noted above and previously in the cross-petition, this Court should grant the cross-petition for writ of certiorari and use this case as an opportunity to clarify the scope and enforceability of the limits on Congress' Spending Clause power.

Respectfully submitted,

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